

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION III

CACR06-564

February 14, 2007

LONNIE NEWTON, JR.
APPELLANT
V.
STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE ASHLEY
COUNTY CIRCUIT COURT
[CR-05-24-1]
HONORABLE SAMUEL B. POPE,
JUDGE
AFFIRMED

Appellant, Lonnie Newton, was tried by a jury and found guilty of the offense of delivery of cocaine. He was sentenced to twenty years in the Arkansas Department of Correction. We affirm the conviction.

Appellant raises four points in this appeal:

- I. The trial court abused its discretion when it refused to grant Newton's request for a continuance where the trial court allowed the substitution of counsel just four days before trial.
- II. The trial court abused its discretion when it refused to grant Newton's request for a continuance where Newton's attorney had medical problems which justified a continuance.
- III. The trial court abused its discretion when it allowed into evidence the tape of the second drug transaction as it was highly prejudicial and outweighed

any probative value it may have had and it concerned a collateral matter that was not relevant to the issue before the trial court.

- IV. The trial court's comment concerning potential other crimes or bad acts by the defendant was prejudicial to the extent that it vitiated the curing instruction given by the trial court concerning the tape of the second drug transaction.

None of the points challenge the sufficiency of the evidence supporting his conviction. Therefore, it is not necessary to recount the facts in detail. Briefly, a confidential informant approached appellant about a possible purchase of cocaine. Appellant took \$20 from the confidential informant, left for approximately four minutes, and returned with what later tested positive for a small amount of cocaine. The particular facts pertaining to each of the four points of appeal will be discussed under those specific points.

The first two points of appeal can best be discussed together because they both involve the trial court's refusal to grant appellant's counsel's request for a continuance:

- I. The trial court abused its discretion when it refused to grant Newton's request for a continuance where the trial court allowed the substitution of counsel just four days before trial;
- and
- II. The trial court abused its discretion when it refused to grant Newton's request for a continuance where Newton's attorney had medical problems which justified a continuance.

When reviewing the grant or denial of a motion for continuance, the appellate court employs an abuse-of-discretion standard. *Whisenant v. State*, 85 Ark. App. 111, 146 S.W.3d 359 (2004). Appellant must not only demonstrate that the trial court abused its discretion by denying the motion, but must also show prejudice that amounts to a denial

of justice. *Id.* When a motion for continuance is based on a lack of time to prepare, we will consider the totality of the circumstances. *Ware v. State*, 348 Ark. 181, 75 S.W.3d 165 (2002). This court has held that a lack of diligence alone is a sufficient basis to deny a motion for a continuance. *Id.* Rule 27.3 of the Arkansas Rules of Criminal Procedure provides, “The court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case.”

Here, the trial was scheduled to begin on November 4, 2005. On October 31, 2005, the trial court allowed Don Gillaspie to substitute as counsel of record for appellant. Three days later, on November 3, the day preceding the scheduled trial, appellant’s counsel, by motion, sought a continuance, contending that he had not been able to prepare properly for the November 4 trial because he had been suffering from heart problems and his cardiologist had made an appointment for his admission into Baylor Heart Hospital in Dallas for November 7. He stated that he was not physically able to effectively try a jury trial as scheduled on November 4 and that he had not had an opportunity to read the file, much less view the videos or engage in meaningful plea negotiations. The trial court denied the request. Appellant argues in this appeal that the trial court abused its discretion in so doing. We disagree.

The bases for the continuance asserted by appellant's counsel involved a combination of illness and lack of time to prepare. In examining the totality of the circumstances, the following time line of events is helpful:

- February 18, 2005 Appellant charged with two counts of delivery of cocaine.
- May 4, 2005 Public defender, G.B. Colvin, appointed to defend appellant.
- July 28, 2005 B. Dale West allowed to replace Colvin as appellant's attorney.
- September 13, 2005 West allowed to withdraw because of deteriorating relationship.
- October 5, 2005 Public defender is apparently back on case.
- October 28, 2005 Don Gillaspie's entry of appearance filed, which states that it was served on the prosecuting attorney on October 18, and apparently signed by the judge that same day, although not filed until 10/31.
- October 31, 2005 Order substituting Gillaspie as counsel filed.
- November 3, 2005 Gillaspie files motion for continuance.
- November 3, 2005 Order denying motion for continuance filed.

Denying the motion for continuance, the trial court reasoned that defense counsel had recently accepted the case; that counsel knew it was set for trial or reasonably should have known that it was; that defense counsel knew of his condition when he accepted the case; and that if counsel's health was such that he could not perform his function as counsel, he should not have accepted the case.

Under the circumstances of this case, we cannot say that the trial court abused its discretion. First, counsel did not condition his substitution as counsel on the grant of a continuance by the trial court. Moreover, even though counsel took the case almost a week prior to the date set for trial, he still did not ask for a continuance until the day before the scheduled trial. Finally, even though counsel asserted that he was experiencing heart problems, he did not provide an affidavit from his doctor or anything of that nature to support his contention and, in any event, he was not scheduled to enter the hospital until after the trial date.

As part of our standard of review, even if we were to determine that the trial court had abused its discretion in denying the motion for continuance, appellant would still have to demonstrate that he was prejudiced by the denial. The only thing that appellant presents in that regard in his brief is the following: “It is axiomatic that a defendant would suffer prejudice if his attorney is not prepared and has not even reviewed the evidence prior to trial.” That assertion is insufficient to demonstrate prejudice in this case.

The only cases cited by appellant with respect to his initial two points are *Butler v. State*, 339 Ark. 429, 5 S.W.3d 466 (1999), and *Brickey v. State*, 148 Ark. 595, 231 S.W. 549 (1921). They are distinguishable from the instant case.

In *Brickey*, counsel was *absent* from the trial because he had to handle a case in another court. The trial court denied counsel’s motion for continuance and appointed another attorney to represent the defendant. On appeal, our supreme court found no abuse of discretion in that denial; however, the supreme court did note that if the *absence* had

been because of sickness or some other unavoidable casualty, it might have constituted an abuse of discretion. Here, we are not dealing with the *absence* of an attorney.

In *Butler*, the attorneys moved to be substituted as counsel and, in addition, stated to the court that there was “no way, coming in at this date, that we could adequately be prepared for trial” by the scheduled date, twenty days hence. In addition, it was undisputed that the State had not provided critical discovery pertaining to the names of each victim connected with each count charged. The trial court granted the first counsel’s request to withdraw, but denied the request of the substitute counsel for a continuance. Our supreme court found that the denial was an abuse of the trial court’s discretion. Here, however, appellant’s substitute counsel did not simultaneously request a continuance; in addition, discovery had already been provided by the State to prior counsel.

III. The trial court abused its discretion when it allowed into evidence the tape of the second drug transaction as it was highly prejudicial and outweighed any probative value it may have had and it concerned a collateral matter that was not relevant to the issue before the trial court.

Appellant was charged with two counts of delivery of cocaine, with one occurring on January 13, 2005, and the second on January 22, 2005. The State’s motion to sever the offenses was granted by the trial court. At the trial of the instant case pertaining to the January 13 transaction, the State sought to introduce the video tape of the second incident (January 22, 2005), but the trial court sustained appellant’s objection to its introduction.

During the State’s cross-examination of appellant, however, he stated:

I have never sold or delivered cocaine before or after January 13. The officer that arrested me told me he had me on film twice for selling drugs. Me and Mr. Johnson did smoke some one day. I did not sell or otherwise deliver cocaine to Mr. Johnson a week later. We went and got it. I was going down the street one day. He was walking. He stopped me and got in the car and told me to go over here to this guy behind Sav-A-Lot. So we went there and the guy met us there and we got it. I don't remember what day it was.

Nothing like what was on the tape happened again. The first time he was in a truck; second time he was walking down the street. I'm pretty sure.

When the defense rested, the State approached the court in a bench conference and sought to introduce the video tape of the January 22 interaction between the confidential informant and appellant to show that "there was no smoking between these two."

Appellant objected, arguing:

[DEFENSE COUNSEL]: I have never seen it. Mr. Newton is not on trial for that and I object. We don't know if they are the same occasion. He said the second occasion. He did not give a date. To display a video which shows an entirely different transaction identical to the deal he is charged with is putting him twice in jeopardy for one offense. It's clearly prejudicial.

TRIAL COURT: I think it's probably proper. It's not any more prejudicial to the Defendant. I think it's rebuttal to his testimony. Mr. Newton chose to testify. It tends to corroborate essentially the same transaction. If the State wants to play it, I will allow it.

[DEFENSE COUNSEL]: The video portrays the exact complete evidence of the offense that was alleged in Count Two of the Information, which the court severed at the request of the prosecutor. We are trying him on that second offense to make him guilty of the first. Second, I requested discovery when I got into the case and I have not received the first thing on discovery until this

morning when I got two or three pieces of paper. I've never been offered to look at the video.

In the first portion of his argument on appeal, appellant contends that the trial court abused its discretion because the tape of the January 22 transaction was highly prejudicial and that other nonprejudicial evidence could have been used to accomplish the same purpose. We find no basis for reversal for the following reasons.

First, the trial court gave the jury a limiting instruction regarding the purposes for which the jury could use the tape and thereby minimizing any prejudicial effect. Second, even if we were to determine that the trial court abused its discretion in allowing the tape, any abuse of discretion would be harmless because appellant admitted that he took money from the confidential informant; that he gave that money to a third party, who in turn gave him cocaine; and that he then took the cocaine back to the confidential informant. As our supreme court explained in *Higgs v. State*, 313 Ark. 272, 273-74, 854 S.W.2d 328, 329 (1993):

Appellant argues that since the third person ultimately took the money appellant cannot be guilty of "delivery" of a controlled substance. The argument is without merit as one does not have to receive money to be guilty of delivery of a controlled substance. Ark. Code Ann. 5-64-401 makes it illegal to deliver a controlled substance. "Delivery" is defined as "the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance or counterfeit substance in exchange for money or anything of value." Ark. Code Ann. 5-64-401 (f) (1987). The statute prohibits the "delivery" of a controlled substance, not its sale. The statute does not require that the perpetrator ultimately receive money, only that he participate in the transfer of the substance in exchange for money or anything of value. The fact that an accused is only the agent of a buyer or seller of drugs does not remove the transfer from the ambit of the statute.

(Citations omitted.) Here, the evidence of appellant's guilt was overwhelming, thereby making any abuse of discretion in the admission of the tape harmless.

Appellant's remaining arguments under this point of appeal are that 1) impeachment cannot be accomplished through the use of extrinsic evidence, citing Rule 608 of the Arkansas Rules of Evidence, and 2) rebuttal evidence should be confined to evidence that is first introduced by the opposing party. Neither of these arguments were raised below, and therefore we will not address them on appeal. It is well settled that the appellate courts will not hear arguments or errors, even constitutional ones, which were not raised at the trial court level by means of a timely, specific objection. *Croston v. State*, 95 Ark. App. 157, ____ S.W.3d ____ (2006).

- IV. The trial court's comment concerning potential other crimes or bad acts by the defendant was prejudicial to the extent that it vitiated the curing instruction given by the trial court concerning the tape of the second drug transaction.

As explained under Point III, the trial court allowed the tape of the January 22 incident but gave a limiting instruction to the jury that it was only to be considered as rebuttal evidence:

You are instructed that the evidence of other alleged crimes, wrongs or acts of Lonnie Newton, Jr. may not be considered by you to prove the character of Lonnie Newton, Jr. in order to show that he acted in conformity therewith on the day of this charge. This evidence is not to be considered to establish a particular trait or character that he may have. It is not to be considered to show that he acted similarly or accordingly on the day of the incident. The evidence is offered for proof of rebuttal of his testimony. *Whether any other alleged crimes, wrongs, or acts have been committed is for you to determine.*

(Emphasis added.) It is the trial court's last comment, italicized above, that appellant asserts as error under his final point of appeal. However, this argument was also not preserved for our review because appellant did not raise it below. *Croston, supra*.

Affirmed.

ROBBINS and MILLER, JJ., agree.